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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

RAFAEL PEREZ,

Defendant and Appellant.

B199922

(Los Angeles County  
Super. Ct. No. BA314784)

APPEAL from a judgment of the Superior Court of Los Angeles County,  
Mary H. Strobel, Judge. Affirmed.

Rachel Lederman, under appointment by the Court of Appeal, for  
Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief  
Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General,  
Linda C. Johnson and Susan S. Kim, Deputy Attorneys General, for Plaintiff and  
Respondent.

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Rafael Perez appeals the judgment entered following his conviction by jury of sale of a controlled substance. (Health & Saf. Code, § 11352, subd. (a).) Perez admitted a prior serious felony conviction within the meaning of the “Three Strikes” law and admitted two prior convictions within the meaning of Health and Safety Code section 11370.2, subdivision (a). The trial court sentenced Perez to a term of 11 years in state prison.

We reject Perez’s claim the trial court erroneously instructed the jury on the use of prior statements as evidence and affirm the judgment.

### **FACTS AND PROCEDURAL BACKGROUND**

#### *1. The People’s evidence.*

On December 28, 2006, at approximately 5:20 p.m., Los Angeles Police Detective Jessie Martinez was participating in an undercover narcotics operation in the area of Temple and Alvarado Streets. Martinez saw Andrew Plejer sitting on a retaining wall behind a gas station. Martinez approached on a bicycle and they nodded to each other. When Plejer asked how he might know Martinez, Martinez responded he “used to buy from Gordo, but I owe him \$10.” Plejer said he did not owe Gordo any money, he had his phone number and would telephone him. Martinez said he wanted forty, referring to \$40 worth of narcotics. Plejer made a telephone call on a cell phone. Martinez heard Plejer say, “Hey, Gordo, it’s me.” “I need a pack, bring me a 40.” “I’ll meet you at the market.” Martinez gave Plejer four prerecorded \$10 bills. Plejer walked down Temple Street and was gone for approximately 10 minutes.

Los Angeles Police Officer Michael Kearney was parked on Temple Street across from a Cuban market. Using binoculars, Kearney saw Plejer walk to the Cuban market, look around, turn and walk back towards a liquor store. Plejer sat in front of the liquor store for about a minute until Perez approached. Plejer and Perez walked together to the Cuban market. When they reached the market, Plejer extended his left hand containing folded currency toward Perez. Perez accepted the money and entered the market. While Plejer waited outside,

Rolando Sanchez approached Plejer and then entered the Cuban market. Three or four minutes later, Perez exited the market and made a motion towards the left. Plejer walked about 10 feet in the indicated direction. Sanchez exited the market and Perez handed him an object. Sanchez took the object to Plejer and handed it to him.

Plejer took the object and walked to the northeast corner of Temple and Alvarado Streets. Plejer waved Martinez to his location, then asked Martinez to follow him. After walking a few minutes, Plejer spat out a clear plastic bindle containing 0.88 grams of a substance containing cocaine in the base form and handed it to Martinez. Uniformed officers participating in the undercover operation arrested Plejer.

Perez and Sanchez were arrested in the Cuban market five to ten minutes after Kearney observed the hand-to-hand exchange.

Oswaldo Vidal, the owner of the Cuban market, testified he knows Perez, whose nickname is Gordo, but denied Perez conducted business in Vidal's store. Perez asked Vidal for two \$20 dollar bills in exchange for four \$10 bills. When the police arrived, they took Vidal's money, including the four ten dollar bills.

After Perez and Sanchez were arrested, Martinez saw the prerecorded bills inside the Cuban market. Martinez checked the incoming calls on Perez's cell phone and verified that Plejer recently had called Perez.

## *2. Defense case*

Plejer testified Martinez approached him at the gas station and asked Plejer to purchase cocaine for him.<sup>1</sup> Plejer asked who Martinez knew. Martinez said he knew Ricky, an individual from whom Plejer formerly purchased cocaine. Based on Martinez's response, Plejer decided to assist Martinez in exchange for half the drugs obtained. After Martinez gave Plejer \$40, Plejer walked 50 feet from Martinez and telephoned Ricky on his cellular telephone. Eventually, Ricky's girlfriend, Gorda, answered the telephone. Plejer told Gorda to meet him at the store.

As Plejer walked toward the store, someone told him the police were in the area. Plejer got confused and lost the \$40 Martinez had given him. When Gorda arrived, Plejer requested \$20 worth of cocaine on credit. Gorda told him to wait outside. After 10 minutes, Plejer noticed the package of drugs was on a crate outside the store. Plejer put the drugs in his mouth and delivered them to Martinez. Martinez told Plejer to go to an alley while he spoke to a female on the telephone. When Plejer went to the alley, he was arrested.

Plejer denied he told the police he gave the four \$10 bills to Perez, that he knew Ricky as Gordo or that he had Gordo's telephone number and called him. Plejer admitted he signed a statement written by a detective at the police station approximately an hour after his arrest but claimed he signed the statement only because the police promised to release him if he did.

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<sup>1</sup> At the outset of the case, Perez, Plejer and Sanchez were charged jointly with sale of a controlled substance. Plejer was convicted pursuant to a plea bargain. Perez and Sanchez were tried together. Sanchez was acquitted. Neither Plejer nor Sanchez is a party to this appeal.

Before Plejer entered into a plea bargain in this case, he wrote a letter to the district attorney in which he claimed Detective Martinez used him to catch Perez because Martinez lost a previous case against Perez. Also in the letter, Plejer indicated his written statement incorrectly states he gave the money to Gordo and it should be Gorda. Plejer's letter also claimed he gave cocaine that he owned to Martinez.

### *3. Rebuttal evidence.*

Kearney testified he interviewed Plejer on the evening of Plejer's arrest for about one hour at Rampart Station. Kearney wrote a two-page account of Plejer's statement. Plejer signed the statement after Kearney went over it line by line and Plejer initialed any mistakes. Plejer seemed afraid of the other individuals who were arrested in the case, Perez and Sanchez. Plejer told Kearney he telephoned Ricky, whom he knew as Gordo, and said, "I have 40." Plejer gave the money to Gordo and then waited outside the store.

## **CONTENTION**

Perez contends the trial court erroneously instructed the jury in the words of Judicial Council of California Criminal Jury Instructions (2006) CALCRIM No. 318 (Prior Statements as Evidence).

## **DISCUSSION**

As given in this case, CALCRIM No. 318 provided: "You have heard evidence of a statement that a witness made before the trial. If you decide that the witness made that statement, you may use that statement in two ways: [¶]

1. To evaluate whether the witness's testimony in court is believable; AND [¶]
2. As evidence that the information in that earlier statement is true."

Perez contends CALCRIM No. 318, in effect, told the jury it should find Plejer's out-of-court statement true if it found Plejer actually made the statement. Perez asserts it was inappropriate to instruct the jury to accept Plejer's unsworn out-of-court statement over his trial testimony, which was given under penalty of perjury. Perez argues CALCRIM No. 318 relieved the jury of the responsibility

of determining Plejer's credibility, shifted the burden of proof and violated his constitutional rights to due process, proof beyond a reasonable doubt and an impartial jury.

Perez claims the error requires reversal because the evidence of guilt was weak and Plejer's testimony showed Perez was not involved in the sale of the cocaine. Perez asserts the jury's request for a read back indicates the deliberations were close. (*People v. Pearch* (1991) 229 Cal.App.3d 1282, 1295.) Further, defense counsel presented strong argument the officers improperly used Plejer to convict Perez. Perez concludes that, absent the instruction, a different result might have obtained.

Perez's arguments are not persuasive.<sup>2</sup>

CALCRIM No. 318 does not instruct the jurors to accept or presume the information in a witness's earlier out-of-court statement is true. Nothing in the instruction tells the jury to give greater weight to the witness's out-of-court statement than it gives to the witness's in court testimony. Rather, CALCRIM No. 318 instructs the jury that it *may* use the out-of-court statement in assessing the credibility of a witness's in-court testimony, and it *may* use the out-of-court statement as evidence of the truth of the matters asserted in the out-of-court statement. The instruction correctly stated the law. (See Evid. Code, §§ 770, 1235.)

In sum, no instructional error appears.

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<sup>2</sup> The People assert Perez forfeited the claim of instructional error by failing to object to the instruction at trial, citing *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1134. However, *Gutierrez* addressed a claim that a limiting instruction should have been given in addition to CALJIC No. 2.13. Here, Perez attacks the instruction as given. Under established rules of appellate review, even in the absence of an objection, we review any instruction that affects the substantial rights of the accused. (Pen. Code, § 1259; *People v. Brown* (2003) 31 Cal.4th 518, 539, fn. 7.)

**DISPOSITION**

The judgment is affirmed.

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KLEIN, P. J.

We concur:

KITCHING, J.

ALDRICH, J.